CIMB Bank Bhd v Tan Kim Leong Holdings Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — NO D7–1775 OF 2001
AMELIA TEE ABDULLAH JC
11 FEBRUARY 2010

Banking — Banker and customer — Claim for amount outstanding under banking facility — Default in repayments — Proposal for settlement — Whether arrangement to fix indebtedness lapsed — Whether defendant failed to settle account within stipulated period

Evidence — Adverse inference — Failure to call witness — Default under term loan facility — Allegation by defendant that extension of time for repayment provided by plaintiff's representative — Whether adverse inference arose against defendants for failure to call plaintiff's representative

The plaintiff's claim was against the first defendant, as the borrower, and the second and third defendants, as the guarantors, of a term loan facility. The term loan facility was entered into between Southern Finance Company Bhd ('SFCB') and the first defendant. Vide a loan agreement dated 16 October 1996, SFCB agreed to extend to the first defendant a term loan facility up to a maximum principal amount of RM1,100,000. The loan was to be repaid by 120 fixed monthly installments of RM24,588 payable on the month following next after the full draw down of the loan. The second and third defendants jointly and severally agreed to indemnify SFCB against all losses and expenses incurred by SFCB as a result of any failure of the first defendant to repay the loan. The term loan was fully disbursed to the first defendant and it later defaulted in its loan repayments. The term loan was secured by a first Party Charge Presentation No 4048/96 over eight (8) properties. Following the default, the plaintiff demanded for the total sum outstanding of RM1,454,579.17 as at 19 July 2001, which amount comprised both principal as well as interest outstanding. After four months from the date of issuance of the letters of demand, the formal settlement discussions between the parties led to the redemption of four (4) of the properties charged for a sum of RM 600,000. During cross-examination, PW1 admitted that vide the plaintiff's letter dated 20 June 2002, the bank had fixed the first defendant's indebtedness at RM1,344,000, a settlement arrangement made between Mr Lau Kim Heng ('Lau') for the plaintiff and the first defendant. However, the above figure was only applicable if the full settlement sum was received by the bank 'on or before 30 August 2002'. As the full settlement sum was not paid within the aforesaid date, the bank's letter dated 12 September 2002

informed the first defendant, inter alia, that it was unable to agree with the settlement proposals. The statement of account showed that as at 11 January 2010, the amount owing by the first defendant and the second and third defendants jointly and severally under the term loan facility was RM352,812.37. The said account took into consideration both the redemption sum of RM600,000 as well as the RM720,000 derived from the proceeds of the auction sale. The defendant contended that the plaintiff had, pursuant to a letter 8 March 2002, promised to grant a rebate of RM150,000 if the full settlement of the outstanding amount was received on or before 31 May 2002. Further, DW1 contended that the timeline of 30 August 2002 was verbally extended with the agreement of Lau. This extension came about after DW1 explained to Lau that it was impossible to obtain financing from another bank before 30 August 2002. The issue considered herein was the plaintiff's offer of a RM150,000 rebate and whether the arrangement to fix the first defendant's indebtedness at RM1,334,000 had lapsed.

Held, allowing the plaintiff's claim with costs:

(1) In the absence of any evidence which showed that the rebate of RM150,000 was still good after 31 May 2002, it was the court's finding that the plaintiff's offer of a rebate was no longer applicable after the first defendant failed to settle the account in full on or before the 31 May 2002. In that premise, the defendants' counterclaim for RM150,000 as rebate was dismissed (see para 44).

(2) It was not in dispute that this alleged agreement of Mr Lau Kim Heng was never reduced into writing. One would have expected that such an important matter with grave consequences in terms of dollars and cents would have been reduced into writing. And even if the plaintiff had not reduced the alleged agreement into writing, surely it would have been in the interest of the defendants to take the necessary precaution of writing to the plaintiff for confirmation of the alleged extension (see para 49).

(3) Since it was the defendants who have alleged that Lau had given them an extension of time to pay the settlement sum of RM1,334,000, it was thus incumbent upon the defendants to call him. No adverse inference could be invoked against the plaintiffs for not calling Lau. On the contrary, an adverse inference could be invoked against the defendants for not even attempting to call Lau or at all. On the totality of the evidence adduced it was more in support of there being no extension (see paras 53–54).

[Bahasa Malaysia summary

Tuntutan plaintif adalah terhadap defendan pertama, sebagai peminjam, dan defendan-defendan kedua dan ketiga, sebagai penjamin kemudahan

pinjaman berjangka. Kemudahan pinjaman berjangka tersebut ditandatangani di antara Southern Finance Company Bhd ('SFCB') dengan defendan pertama. Melalui perjanjian pinjaman bertarikh 16 Oktober 1996, SFCB bersetuju untuk memberikan kepada defendan pertama kemudahan pinjaman berjangka sehingga jumlah maksimum pokok sehingga RM1,100,000. Pinjaman tersebut hendaklah dibayar semula melalui 120 bayaran bulanan tetap sebanyak RM24,588 dibayar pada sebulan selepas pelepasan penuh pinjaman tersebut. Defendan kedua dan ketiga secara bersama dan berasingan bersetuju untuk menanggung rugi SFCB terhadap kesemua kerugian dan pembelanjaan yang ditanggung oleh SFCB akibat daripada apa-apa kegagalan defendan pertama untuk membayar pinjaman tersebut. Pinjaman berjangka tersebut dibayar sepenuhnya kepada defendan pertama dan ia kemudiannya ingkar dalam pembayaran semula pinjamannya. Pinjaman berjangka tersebut dijamin oleh Party Charge Presentation No 4048/96 terhadap lapan harta tanah. Berikutan keingkaran tersebut, plaintif menuntut untuk jumlah yang belum dibayar sebanyak RM1,454,579.17 pada 19 Julai 2001, jumlah yang mana mengandungi kedua-dua jumlah utama dan juga faedah yang belum dibayar. Selepas empat bulan dari tarikh pengeluaran surat-surat tuntutan, perbincangan penyelesaian formal di antara kedua-dua pihak membawa kepada penebusan empat harta tanah yang digadaikan untuk sejumlah RM600,000. Pada pemeriksaan balas, PW1 mengaku bahawa melalui surat plaintif yang bertarikh 20 Jun 2002, bank telah menetapkan jumlah keberhutangan defendan pertama kepada RM1,344,000, penyusunan penyelesaian dibuat di antara Encik Lau Kim Heng ('Lau') bagi pihak plaintif dan defendan pertama. Walau bagaimanapun, jumlah di atas hanya terpakai jika penyelesaian penuh diterima oleh bank 'on or before 30 August 2002'. Oleh kerana jumlah penyelesaian penuh tersebut tidak dibayar pada tarikh tersebut, surat bank bertarikh 12 September 2002 menjelaskan kepada defendan pertama, antara lain, bahawa ia tidak bersetuju dengan cadangan penyelesaian tersebut. Penyelesaian akaun menunjukkan bahawa pada 11 Januari 2010, jumlah yang belum dibayar oleh defendan pertama dan defendan kedua dan ketiga bersesama dan berasingan di bawah kemudahan pinjaman berjangka adalah RM352,812.37. Akaun tersebut mengambilkira kedua-dua jumlah penebusan RM600,000 dan juga jumlah RM720,000 yang terbit daripada keuntungan jualan lelong. Defendan berhujah bahawa plaintif telah, melalui surat 8 Mac 2002, berjanji untuk memberikan rebet sebanyak RM150,000 jika penyelesaian penuh daripada jumlah yang belum dibayar diterima pada atau sebelum 31 Mei 2002. Selanjutnya, DW1 berhujah bahawa tempoh masa 30 Ogos 2002 telah dilanjutkan secara lisan dengan persetujuan Lau. Perlanjutan ini diberikan selepas DW1 menjelaskan kepada Lau bahawa adalah tidak mungkin untuk mendapatkan bantuan kewangan daripada bank lain sebelum 30 Ogos 2002. Isu yang dipertimbangkan adalah tawaran plaintif untuk rebet sebanyak RM150,000 dan sama ada penyusunan untuk

menetapkan keberhutangan defendan pertama kepada RM1,334,000 telah luput.

Diputuskan, membenarkan tuntutan plaintif dengan kos:

(1) Dalam ketiadaan apa-apa keterangan yang menunjukkan bahawa rebet sebanyak RM150,000 masih berkuatkuasa selepas 31 Mei 2002, adalah dapatan mahkamah bahawa tawaran plaintif terhadap rebet tidak lagi terpakai selepas defendan pertama gagal untuk menyelesaikan akaun sepenuhnya pada atau sebelum 31 Mei 2002. Oleh itu, tuntutan balas defendan untuk jumlah RM150,000 sebagai rebet adalah ditolak (lihat perenggan 44).

(2) Tidak dipertikaikan bahawa perjanjian oleh Lau yang didakwa ini tidak pernah dibuat secara bertulis. Seseorang akan menjangka bahawa perkara yang sebegitu penting dengan akibat yang serius berkaitan wang akan diturunkan dalam perjanjian bertulis. Walaupun plaintif tidak membuat perjanjian yang didakwa secara bertulis, semestinya ia akan menjadi kepentingan defendan-defendan untuk mengambil langkah mencegah yang perlu dengan menulis kepada plaintif untuk pengesahan mengenai perlanjutan yang didakwa tersebut (lihat perenggan 49).

(3) Memandangkan defendan-defendan yang mendakwa bahawa Lau yang memberikan perlanjutan masa untuk membayar jumlah penyelesaian sejumlah RM1,334,000, oleh itu adalah wajib ke atas defendan-defendan untuk memanggilnya. Tiada inferens bertentangan dapat digunakan terhadap defendan-defendan kerana tidak memanggil Lau. Sebaliknya, inferens bertentangan boleh digunakan terhadap defendan-defendan kerana tidak mencuba untuk memanggil Lau. Secara keseluruhannya, keterangan yang dikemukakan lebih menyokong bahawa tidak terdapat perlanjutan masa (lihat perenggan 53–54).]

Notes

For cases on claim for amount outstanding under banking facility, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1809–1813.

For cases on failure to call witness, see 7(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 202–222.

Cases referred to

Cempaka Finance Bhd v Ho Lai Ying (trading as KH Trading) & Anor [2006] 2 MLJ 685; [2006] 3 CLJ 544, FC (refd)

Citibank NA v Ooi Boon Leong & Ors [1981] 1 MLJ 282, FC (refd)

Juahir bin Sadikon v Perbadanan Kemajuan Ekonomi Negeri Johor [1996] 3 MLJ 627; [1996] 4 CLJ 1, CA (refd)

A *Kulandi Muthu v Subramaniam Velliappan* [1983] CLJ (Rep) 603, HC (refd)
Utama Merchant Bank Bhd v Dato' Mohd Nadzmi bin Mohd Salleh [2001] 5 MLJ 317; [2003] 4 CLJ 859, HC (refd)

Legislation referred to

B Banking and Financial Institutions Act 1989 s 50
Rules of the High Court 1980 O 14

ASC Cheah (CL Yap with him) (Adnan Sundra & Low) for the plaintiff.
Prem Ramachandran (Kumar Partnership) for the defendants.

C **Amelia Tee Abdullah JC:**

[1] The plaintiff, CIMB Bank Bhd, claims against the first defendant, Tan Kim Leong Holdings Sdn Bhd, as the borrower and the second and third D defendants, Dato Tan Kim Leong and Datin Hiew Ah Lan as the guarantors of a term loan facility.

[2] The term loan facility (pp 12–50 of AB1) was entered into between E Southern Finance Co Bhd ('SFCB') and the first defendant on 16 October 1996. Vide a vesting order dated 17 March 1999 pursuant to s 50 of the Banking and Financial Institutions Act 1989, all rights, interests, assets and obligations of Southern Finance Co Bhd were vested in Southern Bank Bhd. As such, when the case was filed in 2001, the plaintiff named in the statement F of claim was Southern Bank Bhd. Vide another vesting order dated 6 September 2006, all the rights, interests, assets and obligations of Southern Bank Bhd were vested in Bumiputra Commerce Bank Bhd ('BCBB'). BCBB subsequently changed its name to CIMB Bank Bhd.

G **[3]** In the course of the hearing, the plaintiff applied to amend the writ and statement of claim as well as all ancillary documents filed in court to change the name of the plaintiff from Southern Bank Bhd to CIMB Bank Bhd. An amendment was also sought to be made to para 1 of the statement of claim to set out the history behind the name change. There being no objections H from the defendants, the court allowed the application. The court also allowed consequential amendments to be made to the defence and the counterclaim to reflect this change of name.

THE PLAINTIFF'S CASE

I

[4] Vide a loan agreement dated 16 October 1996 (pp 12–50 of AB1), SFCB agreed to extend to the first defendant a term loan facility up to a maximum principal amount of RM1,1000,000. The prescribed interest rate as set out in section 8.01 was base lending rate plus margin of interest.

According to Noor Aini Azis ('PW1'), an executive officer with the plaintiff, the prevailing base lending rate at the material time was 10.8%pa and the margin interest rate was 2.0%pa. The margin interest rate was varied to 2.5%pa with effect from 12 April 1999 and the first defendant was notified of this variance vide the bank's letter dated 12 April 1999 (p 18 of AB2). Vide section 9.01, the loan was to be repaid by 120 fixed monthly installments of RM24,588 payable on the month following next after the full drawdown of the loan. There was also a provision for default interest of 1% above the prescribed rate or such other rate as may be determined by the bank if the borrower fails to repay any amount in accordance with the loan agreement.

[5] Vide a letter of guarantee and indemnity dated 25 September 1996 executed between SFCB and the second and third defendants, in consideration of SFCB agreeing to grant the first defendant the term loan facility, the second and third defendants jointly, severally and unconditionally agreed to and covenanted with SFCB that they would pay on demand all sums, due currently or at any future time, owing and payable by the first defendant. The second and third defendants further jointly and severally agreed to indemnify SFCB against all loss and expense incurred by SFCB as a result of any failure of the first defendant to repay the loan.

[6] The term loan was secured by a first party charge Presentation No 4048/96 dated 16 October 1996 over eight (8) properties known as HS(M) No 6173 to HS(M) No 6180 Lot No 26628 to Lot No 26635 Mukim Petaling, District of Kuala Lumpur. Four (4) of these properties charged (HS(M) Nos 6173, 6174, 6175 and 6176) were redeemed by the first defendant at a redemption sum of RM600,000 in November 2002. As regards the four remaining charged properties, the bank commenced foreclosure proceedings and the said properties charged were successfully auctioned off on 22 June 2004 for a sum of RM720,000. The proceeds of the auction were entered into the first defendant's accounting records to offset part of its indebtedness.

[7] The term loan was fully disbursed to the first defendant and it later defaulted in its loan repayments. Following the default, the plaintiff's solicitors issued a letter of demand dated 3 August 2001 demanding for the total sum outstanding of RM1,454,579.17 as at 19 July 2001, which amount comprised both principal as well as interest outstanding. A similar letter of demand, also dated 3 August 2001, was issued to the second and third defendants as guarantors of the first defendant. According to PW1, the defendants failed to pay the sum demanded.

[8] Evidence was adduced that it was only after four months from the date of issuance of the letters of demand that formal settlement discussions were

initiated between the parties which led to the redemption of four (4) of the properties charged for a sum of RM600,000.

[9] PW1 identified the document at p 67 of AB2 as the statement of account of the first defendant as at 11 January 2010. The statement of account shows that as at 11 January 2010, the amount owing by the first defendant and the second and third defendants jointly and severally under the term loan facility is RM352,812.37. Nor Lizdiana Rithwan ('PW2'), an assistant vice president of the plaintiff, identified her signature appearing on the said statement of account. According to PW1 and PW2, the said account took into consideration both the redemption sum of RM600,000 as well as the RM720,000 derived from the proceeds of the auction sale.

[10] During cross-examination, PW1 admitted that she was aware that vide the plaintiff's letter dated 20 June 2002, the bank had fixed the first defendant indebtedness at RM1,344,000. However, the figure of RM1,344,000 was only applicable if the full settlement sum was received by the bank 'on or before 30 August 2002'. It is obvious that the full settlement sum was not paid on or before the said date as evidenced by the bank's letter dated 12 September 2002 informing the first defendant, inter alia, that it was unable to agree with the settlement proposals. She was also aware that the first defendant had paid RM120,000 and RM59,000 as at 3 June 2002 and that another RM75,000 had been paid as at 28 February 2002. All these payments were taken into account when preparing the statement of accounts. She disagreed that the RM120,000 was not reflected in the statement of account as at 31 December 2002 (p 58 of AB2) and pointed out that the figures RM4,272.29, RM9,778.19, RM9,580.66, RM10,625.67, RM9,603.89, RM9,395.72 and RM66,743.58 all added up to RM120,000.

[11] It is the plaintiff's case that the RM600,000 *plus the balance of the settlement sum* would constitute the settlement amount. PW1 agreed that out of the RM600,000 paid by the first defendant to redeem four (4) of the properties charged, the bank had applied RM228,562.66 towards principal and RM371,437.34 towards interest. She pointed out that these payments made by the first defendant were prepayments and following section 10.01 of the loan agreement, prepayments shall be applied in repayment of accrued interest first. Looking at the plaintiff's letter addressed to the first defendant dated 11 November 2002 (p 142 of AB1), there was still an outstanding balance of RM768,246.63 as at that date. As such, the plaintiff contends that the settlement sum fixed at RM1,334,000 on 20 June 2002 would no longer apply.

[12] PW1 agreed that the bank had already debited RM49,475.89 for legal fees and insurance fees as at 23 November 1999. She offered the explanation

that legal fees are the fees charged by the bank's solicitors for the administration of the loan and for sending out legal notices. Under s 17.28 of the loan agreement, legal fees shall be payable by the borrower to the lender on demand. Insurance fees were incurred for insuring the properties that were charged to the bank. She agreed that the bank could charge fees in respect of matters other than the suit.

[13] PW1 confirmed that in arriving at the figures in the statement of account as at 11 January 2010, she had deducted an amount of RM720,000 being the proceeds from the sale of property. The sums of RM600,000, RM120,000 and RM59,000 had already been deducted before arriving at the figure of RM840,444.29.

[14] PW2 confirmed the accuracy of the statement of account that she signed. She admitted that she did not consult with Mr Lau Kim Heng before signing the said statement and neither was she aware that at one point there was an arrangement between Mr Lau and the first defendant to settle the matter.

[15] PW2 was cross-examined as to the application of the sums paid by the first defendant. With reference to statement as at 31 December 2002 (p 58 of AB2), she agreed that when RM20,000 was paid on 1 July 2002, there was an amount outstanding under the account for interest. However, the RM20,000 paid was not applied towards interest but to principal. She claimed that it was up to the discretion of the bank whether to apply to principal or interest. She maintained that the bank applied the RM179,000 towards principal notwithstanding that at the material time the account had outstanding interest of more than RM300,000.

[16] PW2 confirmed that the settlement agreement at p 37 of AB2 came to an end on 30 August 2002. Although the second defendant wrote a letter to apply for an extension, the bank had rejected the application vide its letter dated 12 September 2002 (pp 131–132 of AB1). She agreed that there was a subsequent arrangement between the bank and the first defendant to partially settle the outstanding sum. The bank agreed to accept a sum of RM600,000 to redeem four units of single storey shophouses held under HS(M) 6173, 6174, 6175 and 6136 Lot Nos 26628, 26629, 26630 and 26631.

[17] PW2 testified that she knew as a fact that loan statements were sent to the customer until 2004. She confirmed the accuracy of the statement of account as at 3 July 2003 (p 64 of AB2). After the redemption of the first four properties, the total outstanding balance as at 2 July 2003 was RM815,342.63. She confirmed that the amount of *principal outstanding* as at

31 December 2002 was RM755,479.72 (p 58 of AB2) and this same principal amount was reflected in the statement of account as at 3 July 2003 (p 64). There would also be interest owing but the amount is not reflected at p 58. No payments had been made towards principal since the date of the statement of account at p 58.

[18] PW2 confirmed that Mr Lau Kim Heng was no longer with the bank, having left early the previous year. She had no knowledge as to where Mr Lau was currently working.

THE DEFENDANTS' CASE

[19] Dato' Tan Kim Leong (DW1) was the second defendant. He and his wife, Datin Hiew Ah Lan, the third defendant, were the guarantors for the term loan taken out by Tan Kim Leong Holdings Sdn Bhd (the first defendant) which was his family property holding company.

[20] The first defendant does not deny entering into the loan agreement and the second and third defendants do not deny signing the guarantee and indemnity agreement. In para 4 of the defence, they have pleaded that 'the validity and the accuracy of the first defendant's indebtedness is challenged'. In a nutshell, the defence can be seen in the first defendant's answer to question 5 of his witness statement where he states that 'the bank has misapplied the repayments made to it over the years and that there is nothing further outstanding under the first defendant's account with the bank'.

[21] DW1 testified that sometime in early February 2002, he had met with Mr Lau Kim Heng to discuss the first defendant's repayment. According to DW1, an agreement was reached where the sum owing on the account was fixed at RM1,334,000 ('the agreed sum') and that previous payments amounting to RM179,000 were to be applied towards the reduction of the agreed sum. The RM179,000 was paid through four cheques as follows:

(a) RM120,000 vide Standard Chartered Bank cashier's order No 202523 dated 3 June 2002;

(b) RM10,000 vide Public Bank Bhd cheque No 275115 dated 30 June 2002;

(c) RM10,000 vide Public Bank Bhd cheque No 275116 dated 30 July 2002; and

(d) RM19,000 vide Public Bank Bhd cheque No 275118 dated 30 August 2002.

[22] DW1 complains that the payments totaling RM179,000 were not applied towards the reduction of the agreed sum. The basis for his saying so was because the payments are 'not reflected anywhere in the statement of account at p 58 of the ikatan dokumen jilid 2'. However, during cross-examination, he had to agree that the figures RM4,272.29, RM9,778.19, RM9,580.66, RM10,625.67, RM9,603.89, RM9,395.72 and RM66,743.58 in the statement would all add up to RM120,000. DW1 then agreed that the amount of RM179,000 had been debited into his loan account to reduce his indebtedness.

[23] The original dateline for the payment of the agreed sum was until 30 August 2002. According to DW1, this timeline was 'extended by agreement between Mr Lau and I'. It is his evidence that this extension came about after he explained to Mr Lau that it was impossible to obtain financing from another bank before 30 August 2002. The eight shophouses charged to the bank had to be revalued before the new bank could approve the fresh loan. According to DW1, Mr Lau said that if DW1 could start working on the redemption straightaway, the bank would not hold him to the timeline of 30 August 2002. In re-examination, he reiterated that no time frame was fixed.

[24] The question arose as to whether there were any documents in support of DW1's evidence that the bank did not hold him to the time line of 30 August 2002. DW1 referred to the statement of account as at 31 December 2002 (p 58 of AB2) where the bank applied the sum of RM19,000 paid on 2 September 2002 towards repayment of principal only. It was argued that if the bank was holding the defendants to the timeline of 30 August 2002, a portion of the RM19,000 would have been applied towards interest. Further, the bank did not, at any time after 1 September 2002, write to fix a fresh timeline for the repayment or inform that the bank was not prepared to honor its promise to accept the agreed sum as full repayment.

[25] During cross-examination, it was pointed out to DW1 that the contents of the plaintiff's letter at pp 131–132 of AB1 were inconsistent with his claim that the timeline of 30 August 2002 was extended. It was suggested that if there was indeed an agreement for an extension, he would have objected to this letter. DW1's response was that he did object. However, no letter evidencing such objection was produced.

[26] In light of his evidence as to the extension of the 30 August 2002 timeline, the court queried DW1 as to *when* the timeline was extended. DW1's answer was 'November 2002'. He admitted that he did not write to the plaintiff to confirm his agreement with Mr Lau. The question that

inevitably arises is the length of the extension that was granted. The court recorded the following astonishing exchange:

> Q: How long was the extension for?
>
> A: *They did not reply*.

[27] Further during re-examination, DW1 disagreed with the suggestion that as at 27 November 2002, he knew that the arrangement had lapsed. When asked the basis for his evidence, his response was that he 'had approached Mr Lau's office at Southern Bank Bhd. He *assured me that he would look into the matter*'. The question remains: Does an assurance of looking into a matter amount to giving an extension?

[28] DW1 was also cross-examined at length as regards the agreed settlement figure or agreed sum. He had not objected in writing when he received various correspondences from the bank where the outstanding balance stated was more than RM1,334,000. He claimed that he had objected to these figures orally to Mr Lau in late October. He also claimed that he had told his then solicitors, Messrs Jayaratnam & Partners, that he objected to the figures. He pointed out that his solicitors had, in their letter to the bank dated 27 November 2002, informed that the outstanding balance as at 1 September 2002 was RM1,003,042.38. However, when queried, DW1 was unable to say if this figure of RM1,003,042.38 as stated in p 20 of AB2 was principle or interest.

[29] According to DW1, he then started work on redeeming the eight properties in two batches of four properties each. The first batch of four properties was redeemed for RM600,000 on 27 November 2002 vide two cheques, namely:

(a) Bank Utama cheque No 062643 dated 4 October 2002 for RM500,000; and

(b) Bank Utama cheque No 063628 dated 4 November 2002 for RM100,000.

According to DWl, the bank did not apply the whole RM600,000 to reduce the agreed sum. Only RM228,562.66 was used to reduce the agreed sum and the balance of RM371,437.34 was applied towards interest.

[30] According to DWl's calculations, if the bank had applied the RM179,000 and RM 600,000 towards reducing the agreed sum, the outstanding amount owing to the bank would have been (RM1,334,000 less RM179,000 less RM600,000=) RM555,000 only.

[31] DW1 was questioned as to why he did not just pay the balance of RM555,000 if indeed the settlement figure was RM1,334,000 and he had already settled RM854,000. The answer that was given was recorded as follows:

> Because Mr Lau says he will look into what Jayaratnam has written to him on the balance sum *to see if he could help us to reduce the redemption sum but he has not come back to us*. (Emphasis added.)

[32] DW1 was asked about the bank's letter dated 25 October 2002 where the bank had stated that the redemption sum of RM600,000 was payable on or before 30 November 2002 and that in the event of the non-receipt of the acceptance letter or non-payment of the redemption sum by the stipulated deadlines, the whole arrangement would be deemed null and void. DW1 admitted that he had signed at the bottom of p 141 of AB1 and handwritten a note to the effect that 'the balance sum of RM403,000 will be forwarded to your good bank on or before the 31 December 2002'. He admitted that he did not pay the RM403,000 as promised. When questioned as to why he had written that the outstanding sum was RM403,000 when he had testified in court that the outstanding sum was RM555,000, his recorded answer was an incomprehensible:

> Because I thought that if I paid RM403,000, then maybe Southern Bank Bhd will allow me to have the other four titles.

As to where he had derived the figure of RM403,000.00 from, DW1's explanation was that he had deducted RM600,000 from the current balance figure of RM1,003,042.38 appearing at p 20 of AB2. The court finds that it is quite obvious that the figure of RM403,000 was only DW1's proposal to the bank. There is no evidence that the bank ever agreed to give the discount. DW1 himself had admitted that Mr Lau could not decide. He had to refer back to his superiors and he did not revert to DW1 after that.

[33] In the course of cross-examination, DW1 admitted that the dateline for the redemption as stated in the 25 October 2002 letter was 30 November 2002. He disagreed that at that point in time, the settlement proposal for RM1,334,000 had lapsed. From his understanding, the bank wanted him to make a proposal within seven days and he had made a proposal as in the handwritten note on p 141.

[34] DW1 further testified that the market value of the second batch of shophouses was RM800,000 as can be seen in the valuation report of *Jurunilai Bersekutu*, the bank's own property valuer. The properties were subsequently foreclosed and a sum of RM720,000 was paid to the bank.

[35] The defendants have also complained about the imposition of legal charges of RM28,267.76 when it had already paid RM49,475.89 as at 12 November 1999. However during cross-examination, DW1 agreed that six (6) years had lapsed since 1 September 2004 when the RM49,475.89 which partially comprised legal fees was imposed.

[36] The defendants have filed a counterclaim in which they are claiming:

(a) RM150,000 as an agreed rebate;

(b) RM371,479.72 as accrued interest wrongfully deducted by the bank; and

(c) interests and costs.

[37] The rebate of RM150,000 was pleaded in paras 6.1 and 6.3 of the defence as well as claimed in the counterclaim. However, there was no mention of this rebate in DW1's witness statement except for a demand for it in the very last answer. From the pleadings, it would appear that this claim of the defendants is premised on the bank's letter dated 8 March 2002 where the bank had stated as follows:

> We are prepared to grant a rebate of RM150,000 subject to the full settlement of the above account on or before 31 May 2002.

The defendants further contend in para 6.3 that based on the agreement of Mr Lau Kim Heng and/or the conduct of the plaintiff, the plaintiff had agreed that the rebate would still be given notwithstanding that an extension of time was given to the first defendant to settle the 'agreed sum'.

[38] In his witness statement, DW1 had asked for the return of RM165,000 together with interest. The court notes that this amount was never previously demanded and not was it claimed in the defendants' counterclaim.

EVALUATION OF THE EVIDENCE AND FINDINGS

[39] In coming to a decision on the plaintiff's claim as well as the defendants' counterclaim, I have carefully perused the evidence adduced by both parties as well as the documents tendered and relied on by them. I have also considered the written submissions and authorities submitted by the parties.

[40] From the pleadings and the evidence adduced, it is clear that the issue to be considered is whether the first defendant has defaulted in the terms and conditions of the tern loan agreement. And in considering this issue, ancillary

issues such as whether the plaintiff's offer of a RM150,000 rebate and the arrangement to fix the first defendant's indebtedness at RM1,334,000 had lapsed.

[41] The loan agreement entered into between the plaintiff as lender and the first defendant as borrower was for a maximum principal sum of RM1,100,000 payable by 120 monthly installments of RM24,588 each. The first defendant does not dispute taking the loan. Neither do the second and third defendants dispute that they stood as guarantors for the loan.

[42] From the pleadings and the contents of the correspondences between the parties, the court finds that the first defendant was in default of its installment repayments. It had forwarded a proposal to the plaintiff dated 8 February 2002 and had subsequently followed up with a banker's cheque for RM75,000 which was described as having 'been sent to you pursuant to your understanding to keep all legal actions in abeyance'. It was following receipt of the first defendant's two letters as aforesaid that the plaintiff wrote the 8 March 2002 letter which contains the promised rebate.

[43] The 8 March 2002 letter must be perused carefully to derive its full import. The court finds the words: 'We are prepared to grant a rebate of RM150,000, *subject to the full settlement of the above account on or before 31 May 2002*' to be clear and unambiguous. The words 'full settlement ... on or before 31 May 2002' read together with the contents of the paragraph which states that:

> In the event of default in any of the above settlement terms, the above arrangement shall be revoked and deemed as null and void and the Bank reserves the rights to resume and/or continue with whatever foreclosure actions and legal proceedings deemed necessary and appropriate to recover the full amount owing under the account ...

means that failure to pay the full settlement sum by 31 May 2002 would result in the revocation of the RM150,000 rebate. That the first defendant did not pay the full settlement sum by the due date is obvious or else this suit would not be before the court.

[44] In the absence of any evidence or at all which shows that the rebate of RM150,000 was still good after 31 May 2002, it is the court's finding that the plaintiff's offer of a rebate was no longer applicable after the first defendant failed to settle the account in full on or before the 31 May 2002. In that premise, *the defendants' counterclaim for RM150,000 as rebate is dismissed*.

A **[45]** The next chapter in the relationship between the parties can be seen from the plaintiff's letter of 20 June 2002 where the plaintiff had indicated its agreement to a compromised settlement arrangement. The court notes that cl 1(a) states that full settlement for the first defendant's account 'has been fixed at RM1,334,000 payable to us *on or before 30 August 2002*'. The **B** plaintiff acknowledges in the letter that four (4) cheques had been sent with the first defendant's letter dated 3 June 2002 and that the amount of RM179,000 would be regarded as partial payments towards the settlement sum upon clearance of the cheques.

C **[46]** The court notes that subsequent paragraphs of the same letter had made it clear that time was of the essence. In the event of default of any of the settlement terms, and with special mention of the 'full settlement dates', the settlement arrangements would be revoked and deemed null and void. In dealings with banking institutions where loans would, in the normal course **D** of events, carry interest and even compound interest, the fixing of a settlement sum at a particular amount would naturally require a borrower to settle in full by the settlement date. Any delay in the settlement would result in loss of interest for the bank.

E **[47]** It is the plaintiff's case that there was no extension of the settlement date. On the other hand, the first defendant contends that the plaintiff had granted them an extension of time to complete the settlement. The court will examine the totality of the evidence to determine if indeed there was an extension of time granted to the first defendant to pay the full settlement **F** sum.

[48] In para 6.3 of the defence, the defendants have pleaded as follows:

> **G** The 2nd Defendant will assert that on the agreement of the Plaintiff's representative, Mr. Lau Kim Heng, and or from the conduct of the Plaintiff itself, the Plaintiff had agreed to an extension of time to enable the 1st Defendant to settle the Agreed Indebtedness, and further that the Rebate would still be given in terms of the letter of offer dated 8.3.2002.

H **[49]** It is not in dispute that this alleged agreement of Mr Lau was never reduced into writing. At the outset, the court will state that one would have expected that such an important matter with grave consequences in terms of dollars and cents would have been reduced into writing. And even if the **I** plaintiff had not reduced the alleged agreement into writing, surely it would have been in the interests of the defendants to take the necessary precaution of writing to the plaintiff for confirmation of the alleged extension.

[50] The defendant submits that since the filing of the defence in 2002, Mr Lau has been pleaded as the person having the conduct of the defendant's account but the plaintiff has failed to call the said Mr Lau as a witness. The plaintiff, on the other hand, has pleaded that the defendants' case is one of confession and avoidance and that the defendant bears the burden of proving what was alleged.

[51] The court has had the opportunity of reading the two authorities cited by the plaintiff. The case of *Kulandi Muthu v Subramaniam Velliappan* [1983] CLJ (Rep) 603 was an appeal from the decision of the magistrate's court. The main ground of appeal was that the magistrate had erred in law in placing the burden of proof of repayment on the appellant/plaintiff instead of on the respondent/defendant. His Lordship Mohd Azmi FJ sitting as a judge of the High Court had held as follows:

> The loan having been admitted, it is for the respondent to prove the repayment and overpayment on balance of probabilities in the evidence. If the repayment and overpayment had been made wholly or partly through appellant's wife and son, it is for the respondent to call them as witnesses. The magistrate therefore erred in law in making adverse inference against the appellant instead of against the respondent for not calling them as witnesses.

[52] In the case of *Utama Merchant Bank Bhd v Dato' Mohd Nadzmi bin Mohd Salleh* [2001] 5 MLJ 317; [2003] 4 CLJ 859 the defendant did not deny the term loan facility granted to him by the plaintiff nor that he had accepted the loan and received the money. His defence was one of confession and avoidance, that is, he confessed that he took the money but claimed that he was excused from repaying because of some independent facts. The High Court, in deciding that the burden of proof of those facts lies on the defendant also referred to the decision in the case of *Juahir bin Sadikon v Perbadanan Kemajuan Ekonomi Negeri Johor* [1996] 3 MLJ 627; [1996] 4 CLJ 1 where the Court of Appeal held as follows:

> He who alleges must prove such allegation and the onus is on the appellant to do so. See s 103 of the Act. Thus, it is incumbent upon the appellant to produce Tan Sri Bashir as his witness to prove the allegation. The fact that the appellant was unable to secure the attendance of Tan Sri Bashir as a witness does not shift the burden to the respondent to produce the witness and testify as to what he had uttered ...

[53] In light of the authorities as outlined above, the court finds that since it is the defendants who have alleged that Mr Lau had given them an extension of time to pay the settlement sum of RM1,334,000, it is thus incumbent upon the defendants to call him. The court finds that no adverse

A inference can be invoked against the plaintiff for not calling Mr Lau. On the contrary, an adverse inference can be invoked against the defendants for not even attempting to call Mr Lau or at all.

B **[54]** The court also finds that the totality of evidence adduced is more in support of there being no extension. In summary, the evidence against there being an extension can be itemised as follows:

(a) the plaintiff's letter dated 12 September 2002 (pp 131–132 of AB1) was written soon after the expiry of the dateline of 30 August 2002. From the contents of the letter, it would appear that the first defendant was even at that late date attempting to put forth more settlement proposals. The plaintiff had categorically responded that they were unable to accommodate the proposals. If there was an extension of time granted, there would have been no need to put forth more settlement proposals. The contents of this letter runs contrary to there being an extension of time beyond 30 August 2002 to settle the full settlement sum;

(b) the absence of any letter from the first defendant to object to or place on record its objections to the plaintiff's letter of 12 September 2002. If indeed an extension of time was granted, surely the first defendant would have raised objections. The court finds DW1's evidence that he had raised his objections with Mr Lau to be neither convincing nor borne out by the evidence as no letter evidencing such objections was ever produced;

(c) the court finds the defendants' argument that time was required for them to secure a bank loan for the redemption of the shophouses to be unconvincing evidence in support of their argument that there was an extension. As no settlement was reached by the settlement dateline of 30 August 2002, the plaintiff would be at liberty to take appropriate action vis a vis the collateral. The court finds that the proposals re the redemption of the shophouses to be distinct and separate proposals as opposed to the settlement arrangements as per the plaintiff's letter of 20 June 2002;

(d) the defendants have suggested that the fact that the RM19,000 paid on 1 September 2002 was applied towards principal and not interest supports their contention that there was an extension. Regrettably, the court does not find this to be so. Quite apart from the evidence of the plaintiff's witnesses that they had the discretion whether to apply a repayment towards interest or principal (which does not sound too convincing), the court notes that *the date of the payment* together with the promise in para 1(b) of the 20 June 2002 letter that the amounts of the four cheques would be regarded as partial payments towards the settlement of the settlement sum upon clearance of the cheques makes

it quite unsurprising that the RM19,000 was applied towards principal. Further, the court finds that this solitary fact by itself does not lead the court to the conclusion that there was an extension to the dateline of 30 August 2002; and

(e) subsequent letters between the parties would tend to show that there was no extension of the 30 August 2002 dateline. The court notes that the defendants' subsequent letters never allude to the settlement figure of RM1,334.000. In fact, letters such as the plaintiff's letter dated 25 October 2002, on which the second defendant (acting for the first defendant) had promised to pay 'the balance sum of RM403k... on or before the 31 of December 2002', would give rise to the contrary conclusion that there was no longer an agreed settlement figure of RM1,344,000 as at that date.

[55] The evidence of DW1 during cross-examination would in fact show quite conclusively that there was in fact no agreement by the plaintiff to extend the dateline. When asked about the length of the extension, if indeed there was an extension, his answer was 'They did not reply'. When asked why he disagreed that the arrangement had lapsed, he replied that he had approached Mr Lau for an extension and 'he assured me he would look into the matter'. And when asked why he did not just pay RM555,000 if the settlement figure was still valid and he had already paid RM854,000, he offered the explanation that Mr Lau had promised 'to see if he could help us to reduce the redemption sum but he has not come back to us'. The court finds from the foregoing evidence that DW1 had approached Mr Lau for an extension as well as a reduction of the redemption sum for the shophouses. It is quite obvious that DW1 had taken Mr Lau's platitudes of looking into the matter etc as an agreement. Unfortunately that cannot be so. The court finds conclusively that there was no extension of the settlement date where the plaintiff would fix the settlement figure at RM1,344,000. The court further finds that as the first defendant had not settled the full settlement sum by the said date, that arrangement had lapsed and the plaintiff was no longer bound by the arrangement to fix the liability on the first defendant's account at RM1,344,000.

[56] Having said that, the court will next deal with the issue of the amount due and owing by the defendants. The plaintiff relies on section 17.17 of the loan agreement dated 16 October 1996 in submitting that a statement of the manager, assistant manager, accountant or any other officer of the plaintiff as to the amount of such balance shall be final and conclusive of the amount owed by the first defendant. In respect of the guarantors, reliance is placed on section 25 as the basis for arguing that a certificate signed by an officer of the plaintiff as to the monies due and owing from the guarantors to the bank as to the liabilities of the guarantors or any account settled or stated by or

between the bank and the guarantors shall be accepted as conclusive evidence that the amount was due and owing. It is the plaintiff's submission that the statement of account as at 11 January 2010 (p 67 of AB1) is conclusive evidence that the defendants are indeed indebted to the plaintiff for a sum of RM352,812.37 as at that date.

[57] The defendants, on the other hand, have argued that the plaintiff has offered no formal proof of indebtedness. Their argument is that the exact wordings in section 17.17 of the loan agreement is different from the respective clauses in the authorities cited which have upheld the conclusive evidence clauses. The defendants contend that section 17.7 does not carry the words 'evidence', 'proof, 'indebtedness' or legal proceedings' and that in light of these deficiencies and following the contra preferentum rule, the provision must be construed in favour of the defendants.

[58] I have carefully perused relevant authorities pertaining to this issue. The decision in *Cempaka Finance Bhd v Ho Lai Ying (trading as KH Trading) & Anor* [2006] 2 MLJ 685; [2006] 3 CLJ 544 stemmed from a summary judgment application under O 14 of the Rules of the High Court 1980. The Federal Court, in allowing the appeal, found that the Court of Appeal had misapplied the relevant principles relating to an application for summary judgment when it required the plaintiff to give further evidence of indebtedness. It upheld the certificate of indebtedness clause, also known as the conclusive evidence clause, and held that 'there is nothing to indicate or suggest any manifest error on the face of the said certificate nor is there any fraud shown'.

[59] In the case of *Citibank NA v Ooi Boon Leong & Ors* [1981] 1 MLJ 282, His Lordship Raja Azlan Shah CJ (Malaya) (as His Highness then was), in lending support for a conclusive evidence clause, held as follows:

> In the present case, the guarantee contains a clause which enables the bank by producing a certificate of indebtedness by its officer to dispense with legal proof of the actual indebtedness of the respondents ... It means that for the purpose of fixing liability of the respondents, the company's indebtedness may be ascertained conclusively by a certificate.

[60] I am satisfied that based on the above authorities cited, an exclusive evidence or conclusive evidence clause would have entitled the plaintiff to rely on a statement of account or certificate signed by an officer of the bank as conclusive evidence of the amount due and owing from the defendants where there is no manifest error on the face of the statement or certificate.

[61] I have carefully perused the words appearing in the conclusive evidence clauses in both *Cempaka Finance Bhd* as well as *Citibank NA* as compared with the provisions of section 17.17 of our instant case. Whilst it is true that section 17.17 may not contain the words 'proof', 'indebtedness' or 'legal proceedings', the court is of the view that what is important is not so much whether those words appear in section 17.17 or otherwise but rather the intent and purport of the section itself. From a reading of section 17.17, the court is of the view that the provision was meant to enable the plaintiff, by producing the statement of account prepared in accordance with section 17.17, to dispense with legal proof of the actual indebtedness of the first defendant. Thus, it is the court's finding that for the purpose of fixing the liability of the defendants, the indebtedness may be ascertained conclusively by the statement of account.

[62] In our instant case, the defendants have disputed the quantum of the indebtedness. It is not just any dispute of quantum that would have the effect of persuading the court to decline to accept the conclusive evidence clause. The dispute or questions raised should indicate or suggest a manifest error on the face of the record itself.

[63] The defendants have alleged that previous payments made by them have not been taken into account by the plaintiff when preparing the statement of accounts. The court finds their complaints as regards the payments of RM75,000, RM120,000, RM59,000 and RM600,000 to be totally without basis. Whilst these figures may not appear as a lump sum, the court finds that the plaintiff has succeeded in showing quite clearly that the totality of various figures in the statement of accounts would make up the payments made. Reference is made to Appendix A attached to the plaintiff's submissions from which it can be seen that:

(a) the sums of RM3,274.09, RM11,595.49, RM10,758.31, RM11,072.25, RM11,304.78, RM10,243.98, RM11,326.79 and RM5,424.31 would add up exactly to the RM75,000 paid by the first defendant (see items highlighted in green);

(b) the sums RM4,272.29, RM9,778.19, RM9,580.66, RM10,625.67, RM9,603.89, RM9,395.72 and RM66,743.58 would add up exactly to the RM120,000 that was paid (see items highlighted in yellow);

(c) the sums RM20,000, RM20,000 and RM19,000 would add up to RM59,000 which the first defendant had paid (see items highlighted in blue); and

(d) the sums of RM371,437.34 and RM228,562.66 add up to the RM600,000 paid for the redemption of the four shophouses (see items highlighted in pink).

The court thus finds that the defendants' complaint that the statement of account is in error for not taking into account all payments made to be totally without basis. On this score, the court commends learned counsel for the plaintiff for grouping and highlighting the payments on the statement of account which has the effect of shining a beacon on a potentially murky picture.

[64] The defendants also contend that there were inaccuracies in the statement of account when they query how the amount outstanding could 'balloon' to RM815,000 as at 3 July 2003. The court finds that the defendants' 'method of calculating the amount that should be due in para 21 of its submissions has calculated only a year's interest (2002). The flaw is in not calculating the interest from 19 July 2001–31 December 2003, which is a period of almost 1 1/2 years.

CONCLUSION

[65] Based on the facts of the case, the court finds that the plaintiff has succeeded in establishing its case against the defendants on a balance of probabilities. The court finds that the promise of a rebate had lapsed after the first defendant failed to settle the account in full on or before 31 May 2002. The court further finds that the arrangement to fix the full settlement sum had lapsed when the first defendant failed to settle the said full settlement sum on or before the due date of 30 August 2002 and there was no agreement by the plaintiff to extend the settlement date. The court finds that the plaintiff has succeeded in proving its case against the first defendant as borrower of the term loan facility and the second and third defendants as guarantors of the first defendant for the loan. Based on the statement of account as at 11 January 2010, the amount outstanding as at that date is RM352,812.37. Accordingly the court hereby orders the defendants to pay to the plaintiff the sum of RM352,812.37 and interest thereon at the rate of 8%pa from the date of judgment until full settlement together with costs. The defendants' counterclaim is also dismissed.

Plaintiff's claim allowed with costs.

Reported by Ashgar Ali Ali Mohamed